No. 73-1807

In the

Supreme Court of the United States

OCTOBER TERM, 1973

STANLEY A. PAPIERZ, et al.

Petitioners,

vs.

ROBERT K. RAUTH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

J. HERZL SEGAL
GARY D. FRIEDMAN
LAWRENCE C. RUBIN
180 North LaSalle Street
Chicago, Illinois 60601
Attorneys for Petitioners

Of Counsel:
ARVEY, HODES, COSTELLO & BURMAN
180 North LaSalle Street
Chicago, Illinois 60602

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

Petitioners pray that a writ of certiorari issue to review the judgment of The Appellate Court of Illinois, First Judicial District, entered in the above-entitled cause on December 18, 1973, which became final on March 28, 1974 when the Supreme Court of Illinois denied a Petition for Leave to Appeal to that Court.

CITATIONS TO OPINIONS PREVIOUSLY REPORTED IN THIS CAUSE.

No opinion was rendered by the trial judge. The decree entered on March 1, 1973 by the trial judge is set out

below in Appendix A*. That decree was appealed to the Appellate Court of Illinois, First Judicial District and the decision of the Appellate Court is reported at 16, Ill. App. 3d 574, ... N.E. 2d ..... (1974), and is reprinted in Appendix B. The decision of the Appellate Court of Illinois was appealed to the Supreme Court of Illinois by the filing of a petition for leave to appeal. The petition for leave to appeal was denied by the Supreme Court of Illinois in a *per curiam* order without opinion. That order is reprinted below as Appendix C and is not reported.

JURISDICTION

The judgment of the Appellate Court of Illinois, First Judicial District was entered on December 18, 1973. Petitioner filed a petition for leave to appeal from that decision with the Supreme Court of Illinois on February 13, 1974, which was denied on March 28, 1974. No further appeal procedure is provided under Illinois law and the judgment of the Appellate Court of Illinois became the final judgment of the highest court of the State of Illinois in which a decision could be had. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

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* As stated below the question presented by the *instant* petition concerns the propriety of the appointment of a receiver by the trial judge to manage an apartment complex in the possession and control of the petitioners. Approximately two and one-half years prior to the entry of the decree appointing the receiver a prior decision of the Appellate Court of Illinois, First Judicial District was rendered concerning the sole question of whether the parties to this litigation were joint venturers in the apartment complex for which the receiver was appointed. While the issues litigated in that decision are not before this court in the instant appeal, the opinion rendered in that decision is reported at 129 Ill. App. 2d 117, 262 N.E. 2d 773 (1970) and is reprinted herein in Appendix D.

QUESTION PRESENTED

Whether the petitioners were deprived of their property without due process of law when the trial judge appointed a receiver to manage a two hundred unit apartment complex, then in the possession and control of the petitioners, without notice of the receiver's appointment, without requiring the filing of any pleadings or petitions directed to the receiver's appointment and without conducting any evidentiary hearing whatsoever relating to the receiver's appointment.

CONSTITUTION PROVISION INVOLVED

The case involves the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution which provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The essential issue presented in this case is directly related to, and a logical extension of, recent decisions by this court defining the procedures to which our judicial system must adhere before depriving a litigant of his property, *Mitchell* v. *W. T. Grant & Co.*, Docket No. 72-6160, *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), *Gonzalez* v. *Automatic Employees Credit*

Union, Docket No. 73-3623, and *Bell* v. *Burson,* 402 U.S. 535 (1971). In the instant case the question presented is whether the appointment of a receiver under the circumstances set forth below deprived the petitioners of a significant property interest without due process of law.

Respondent, Robert K. Rauth filed this action against the petitioners, Stanley Papierz, Theresa Papierz, Stanley Papierz Builders, Inc., and S. P. Construction, Inc., seeking to establish a thirty percent joint venture interest in an apartment complex known as the "Villa Venice Apartments." A trial was held as to whether a joint venture existed between the parties. The trial court concluded that no joint venture existed and dismissed Rauth's complaint. Rauth appealed that decision to the Appellate Court of Illinois which reversed the trial court's decision and found that Rauth was entitled to a thirty percent interest in the project. The Appellate Court remanded the case to the trial court with specific directions as to the relief which Rauth was to be granted. (A copy of that opinion is reprinted herein as Appendix D). It should be noted that during the entire proceedings before the trial and appellate courts continuing over six years, no allegation was ever made nor any evidence introduced indicating that Rauth's interest in the Villa Venice was in any danger whatsoever or that the property might be subject to transfers or somehow be placed beyond the jurisdiction of the court. The question was simply never brought before the court.

After the issuance of the Appellate Court's opinion on September 18, 1970, no additional pleadings or petitions were filed, nor was any additional evidence received, affidavits submitted, or stipulations of fact entered into between counsel. Nothing at all occurred in the case except arguments of counsel over the form of the decree which

would comply with the precise directions of the mandate of the appellate court.

When counsel could not stipulate to the form of a decree the chancellor prepared a decree which was entered on March 1, 1973, from which this appeal resulted. Without any prior notice, without a single pleading or petition requesting the appointment of a receiver, without conducting an evidentiary hearing, the trial judge took possession and control of the Villa Venice Apartments away from the Papierzes, who were its seventy percent owners and had maintained the complex as an ongoing enterprise for over ten years, and appointed a receiver to run the property.

The Appellate Court of Illinois, First Judicial District affirmed the receiver's appointment. In its opinion the court concluded (1) that the Papierzes did have notice of Rauth's request for the appointment of the receiver and (2) that the appointment was proper because:

> "It is reasonable to fear that there is a danger in this case that the property which belongs to the joint venture may be placed beyond the jurisdiction of the court or in some way involved in transfers, conveyances or subjected to claims so as to render it more difficult for the court to give and enforce final relief to which counterclaimant may be found entitled." 16 Ill. App. 3d at 582.

Neither conclusion can be supported by the record.

The Papierzes never had notice of Rauth's request for the appointment of a receiver because there never was such a request. In proceedings before the trial court the attorney for Robert Rauth expressly acknowledged the fact that no pleading or petition was ever filed by Rauth requesting the receiver's appointment. He stated:

> "There was no motion for any receiver that Roth (sic) has filed." (that page of the transcript is attached hereto as Appendix E).

The only mention of a receiver that Rauth ever made was the provision for the appointment in a proposed decree presented to the trial judge almost eighteen months prior to the receiver's appointment. After Rauth had included that relief in his decree its propriety was expressly rejected by the Chancellor who determined that as far as any . . . receivers are concerned, there will be . . . . no receiver." (R. 63). The Papierzes had no notice that the appointment of a receiver was ever under consideration or any notice that the question was before the court.

Similarly, the Appellate Court's fear that Rauth's interest in the property or its proceeds was in jeopardy cannot be supported by the record. There is not a single allegation in any pleading, petition or motion alleging or even suggesting that the property or its proceeds were in any danger. Nor is there any allegation that after the Appellate Court declared the parties joint venturers that Rauth were deprived of any relevant information relating to the property. Nor is there any allegation that Rauth was deprived of any relevant information relat- management and control to the extent of his interest. In addition the criticism of the petitioners for conveying a certain portion of the property and the characterization of that transactions as a "badge of fraud," is similarly unfounded. The transfer took place after the petitioners had won the case and before the Appellate Court had found that a joint venture existed between the parties. Perhaps the best evidence that Rauth's interest in the property and its proceeds was not in any danger was the fact that in ten years of litigation Rauth never filed a single petition or pleading requesting a receiver because he himself did not harbor the fears which the Appellate Court expressed as a basis for affirming the appointment.

WHEN AND HOW FEDERAL QUESTION RAISED

The petitioners were deprived of their property without due process of law when the trial judge appointed a receiver to manage a two hundred unit apartment complex then in their possession and control, without notice, without any pleadings or petitions requesting the appointment of a receiver and without any evidentiary hearing relating in any way whatsoever to the receiver's appointment.

Petitioners immediately appealed the appointment of the receiver to the Appellate Court of Illinois, First Judicial District and asserted that the receiver's appointment deprived them of their property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. (Appellant's brief pages 23 to 27). After the Appellate Court affirmed the receiver's appointment, the petitioners appealed to the Supreme Court of Illinois by filing a petition for leave to appeal with that court. In the petition for leave to appeal, the Petitioners again raised and argued the point that the appointment of the receiver deprived them of their property without due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution. (Petition for Leave to Appeal Pages 24 to 25). (Copies of the above brief and petition for leave to appeal are filed herewith).

REASONS FOR GRANTING THE WRIT

I.

THE ESTABLISHMENT OF PROPER PROCEDURAL STANDARDS GOVERNING THE APPOINTMENT OF RECEIVERS IS ONE OF EXTRAORDINARY IMPORTANCE TO THE ADMINISTRATION OF JUSTICE THROUGHOUT OUR JUDICIAL SYSTEM.

It is clear that the issues presented in this case are of extraordinary importance in establishing proper procedural standards for the appointment of a receiver. The importance of the remedy is evidenced by the fact that it is utilized in virtually all of the fifty states. Receivers have been appointed to take possession of property in innumerable situations. The courts have had occasion to appoint receivers to run apartment buildings, banks, cemetaries, insurance companies, chemical companies, bus lines and numerous other businesses.

The establishment of sound procedural safeguards is vitally necessary to protect the property rights of those whose possession and control are being displaced. The questions which this court is asked to adjudicate concerns the essential procedural safeguards to which those individuals are entitled. The divestment of possession and control through the appointment of a receiver is one of harshest remedies known to the law *Gunther* v. *Dorff*, 296 S. W. 2d 638 (1956). It is an extraordinary and severe remedy and its misuse can cause drastic consequences in business relations with financial lenders, employees, and customers. The appointment deprives those individuals who are in possession and control of a significant interest in property. They are deprived of their right to continue to run and maintain a business enterprise which in the instant case had been in existence for over ten years. That

deprivation cannot be allowed to occur unless it is in compliance with the requirements of due process of law established by the Fourteenth Amendment to the United States Constitution and as interpreted by applicable decisions of this court.

It would seem incumbent upon this court to define the procedural safeguards which must be followed in the appointment of a receiver for the same compelling reasons that prompted it to act in the area of other extraordinary judicial remedies such as repossession, judicial sequestration, writs of replevin, garnishments, and other divestments of property rights through judicial action. As the essential safeguards of due process have been established in those areas so should they be established for the important remedy of receivership. That will insure that a divestment of a property right will only occur in strict compliance with established procedures of due process. Unless the requirements of due process are strictly defined by this court, there is continuing danger that some courts will deprive litigants of property rights without due process, as the courts below did in the case at bar.

II.

THE DECISIONS OF THE COURTS BELOW HAVE ADJUDICATED THAT INDIVIDUALS MAY BE DEPRIVED OF THEIR PROPERTY WITHOUT REQUIRING NOTICE, WITHOUT REQUIRING THE FILING OF ANY PLEADINGS AND WITHOUT AN EVIDENTIARY HEARING IN CONTRAVENTION OF APPLICABLE AND CONTROLLING DECISIONS OF THIS COURT.

It cannot be disputed that individuals who are going to be deprived of a "significant interest in property" are entitled to notice and a hearing before the deprivation of

their property absent some compelling governmental interest to the contrary. While the form of notice and hearing may vary depending on the property interest involved and the nature of the proceeding, the right to notice and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545 (1965), *Baldwin* v. *Hale,* 1 Wall 223 (1876), *Boddie* v. *Connecticut,* 401 U.S. 379 (1971), *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). In the case at bar the trial judge deprived the petitioners of their property without any regard for the above principals which our legal system holds as inviolate.

When the litigation began, the sole question which Rauth brought before the court was whether he was a thirty percent owner in the project and whether Stanley and Theresa Papierz were entitled to complete ownership of the project. While the trial court concluded that Rauth was not a joint venturer with the Papierzes the Appellate Court disagreed and in essence awarded Rauth a thirty percent interest in the project.

During the initial trial and appeal, Rauth never requested the appointment of a receiver. After the case was remanded to the trial court, no additional pleadings or petitions were filed by Rauth, nor was any additional evidence received by the trial judge. No allegation was ever made by Rauth that he feared that the property or its proceeds were in any danger. No allegation was made by Rauth that he was being deprived of his lawful right to participate in the management and operation of the complex to the extent of his interest. Nor was any allegation ever made that Rauth was being denied any relevant information relating to the project. These are the allegations which when proven will customarily sup-

port the appointment of a receiver. *Von Ness* v. *Arado*, 257 Ill. App. 56 (1930). *Gordon* v. *Washington*, 295 U.S. 30 (1934). In the instant case not only did Rauth fail to introduce any evidence to substantiate those allegations, the allegations were never made.

After over two and one half years had elapsed since the filing of the original appellate court opinion, the trial judge, without any notice, without requesting the filing of any pleading or petition requesting the appointment of a receiver and without an evidentiary hearing, *sua sponte* appointed a receiver to manage the Villa Venice Apartments. The Papierzes, who were the owners of a seventy percent interest in the apartment complex, had managed and maintained the complex for over ten years. The apartment complex was sustained as an ongoing operation through the hard work and dedication which they devoted to the project.

With the appointment of the receiver the trial judge deprived the petitioners of a significant interest in property, the right to maintain, manage and control an apartment complex valued at over $3,500,000.00 in which the petitioners had their financial security invested. Several lower court cases have considered the effect of the appointment of a receiver in circumstances identical to the case at bar. In *State* v. *Superior Court of Marion County*, 144 N.E. 747 (1924) the Indiana Supreme Court stated that:

> "Being in full possession under claim of such ownership as would give them the right to continue in possession, that possession could not be taken from them without notice, a hearing and an adjudication." 144 N.E. at 749.

The court ruled that to do otherwise would be direct violation of established concepts of due process of law.

The effect of the actions of the trial judge it is most succinctly stated in *Noxon Chemical Products Co.* v. *Leckie,* 39 F. 2d 318 (3rd Cir. 1930). In *Noxon* the court of appeals was presented with an appointment under similar circumstances as the case at bar. The court stated:

> "In this situation, the appointment of the receiver immediately, and of itself, divested the defendant of title to all its property, assets and business and the issuance of the injunctions which deprived the defendant of the exercise of its corporate powers and franchises, constituted a clear taking of its property without due process of law in violation of the Constitution of the United States." 39 F.2d at 320.

In another opinion arising out of the same factual situation the Court stated:

> "(T)hat the appointment of a receiver without affording the defendant an opportunity to be heard upon the application was a taking of its property without due process of law . . ." *Nottebaum* v. *Leckie,* 31 F. 2d 556, 559 *cert. den.* 280 U.S. 558 (1928).

In the instant case the Papierzes never had the opportunity of notice and a meaningful hearing. The Appellate Court's assertion that the petitioners had notice of Rauth's request for the appointment of a receiver is without foundation in fact or law. Rauth's attorney expressly stated before the court that Rauth had never made an application for the appointment of a receiver. The only mention Rauth ever made concerning the appointment was in a proposed decree which he presented to the trial judge approximately eighteen months before the receiver's appointment. That request was rejected by the trial judge who without equivocation stated that no receiver would be appointed. During the intervening time period the petitioners were never aware that the court was even

mentally entertaining the possibility of appointing a receiver. Without pleadings setting forth the requisite allegations for the appointment of a receiver and without allowing the petitioners to join issue on such allegations, no meaningful hearing could ever be had, nor was one had. The appointment occurred in a literal vacuum because it was not even known to the petitioners that the court, *sua sponte* was deliberating on the issue of the appointment of a receiver.

The Appellate Court's expressions of fear for the property are similarly generated *sua sponte* without the requisite foundation of a pleading nor a scintilla of evidence anywhere within the record. Petitioners can only guess that the Appellate Court expressed these fears because the petitioners, at the trial and during the first appeal were vigorously contesting the existence of the joint venture. Because the Papierzes were found to be the overzealous guardians of a project which they had literally build with their own two hands, the Appellate Court has deemed that their rights as 70% owners of the project are of no regard. Merely because the petitioners' position was rejected as to on issue of this case does not mean that they can be deprived of their rights in other respects. The petitioners have been deprived of their property without any of the precedural safeguards which the federal constitution grants to each and every person.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

J. Herzl Segal
Gary D. Friedman
Lawrence C. Rubin
180 North LaSalle Street
Chicago, Illinois 60602
Attorneys for Petitioners

Of Counsel:
Arvey, Hodes, Costello & Burman
180 North LaSalle Street
Chicago, Illlinois 60601

APPENDIX A

DECREE ENTERED BY THE TRIAL JUDGE ON MARCH 1, 1973

DECREE

This cause coming on to be heard on all of the pleadings herein and the Court having considered the Appellate Court Opinion, Judgment and Mandate rendered in this cause (*Hurst* v. *Papierz,* 129 Ill. App. 2d, 117, 262 NE 2d 773), reversing the May 22, 1968, Decree of this Court, and the Court having considered the arguments of counsel and being fully advised in the premises, FINDS:

(A) That this Court has jurisdiction of the parties hereto and the subject matter hereof.

(B) That the Appellate Court found that the equities in this cause are with the counterclaimant, ROBERT RAUTH, and against the counterdefendants, STANLEY PAPIERZ, THERESA PAPIERZ and STANLEY PAPIERZ BULIDERS, INC. and that ROBERT RAUTH is entitled to the relief directed to be given to him by said Mandate.

(C) That the counterdefendants, STANLEY PAPIERZ, THERESA PAPIERZ and STANLEY PAPIERZ BUILDERS, INC., were found by the Appellate Court to have wrongfully and fraudulently denied ROBERT RAUTH's 30% interest as a joint venturer in the Villa Venice apartment buliding complex; it was further found that since 1963 said defendants excluded ROBERT RAUTH from the operation and profits of said apartment building complex and that said counterdefendants possessed and operated said apartment buildings and refused to account to ROBERT RAUTH.

(D) That the Appellate Court found that the counterdefendants, STANLEY PAPIERZ and THERESA PAPIERZ, and the counterplaintiff ROBERT RAUTH,

were joint venturers in the real estate development known as "Villa Venice West" and that ROBERT RAUTH owned a 30% interest therein.

(E) That the Illinois Appellate Court, First District, directed this Court to enter a Decree as follows:

(1) directing the conveyance by Stanley Papierz Builders, Inc. to S. P. Construction, Inc. of the property described in Paragraph 11 of the Rauth Counterclaim;

(2) granting Rauth the relief sought in Paragraphs (b), (c), (d) and (e) of the prayer for relief sought in his Counterclaim;

(3) entering such further orders as may be just and equitable; and

(4) vacating its order assessing the Master's fees and reassessing them in the light of this opinion.

(F) That no Petition for re-hearing of the Decision of the Appellate Court was filed nor was a Petition for leave to appeal to the Illinois Supreme Court and the Mandate of the Appellate Court remanding this cause to this Court issued in the Appellate Court on January 7, 1971.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the Decree entered herein on May 22, 1968, be and the same is hereby vacated, set aside and held for naught insofar as it dismissed the Amended Counterclaim of ROBERT RAUTH.

2. That ROBERT RAUTH is hereby decreed to be the owner of a 30% interest in the real estate development known as "Villa Venice West" as represented by his ownership of 30% of the outstanding common stock of S. P. Construction, Inc.

3. That defendants, STANLEY A. PAPIERZ, THERESA PAPIERZ. STANLEY PAPIERZ BUIL-

DERS, INC., and any other person, firm or corporation asserting any interest in the following described property shall forthwith convey to S. P. Construction, Inc., a corporation, said premises located in the Village of La Grange, Illinios:

> Lots 1 to 48 in Block One and Block Eight in First Addition to West Chicago, being a Subdivision of that part of the West one-half of the South East one-quarter of Section 9, Township 38 North, Range 12, lying North of Vial Road (so called) in Cook County, Illinois.

Said conveyance shall be and is intended to include all of the real property, buildings, garages, outbuildings and all other structures appurtenant to and comprising a part of the apartment building complex known as "Villa Venice West" and located as aforesaid.

4. From and after the entry of this Decree, all income, receipts, revenues and proceeds thereafter derived from the operation of "Villa Venice West", in whatsoever form, and all assets, including cash on hand, shall became the property of S. P. Construction, Inc.

5. MICHAEL P. GIAMBRONE is hereby appointed Receiver to manage "Villa Venice West" until further order of this Court. Said Receiver shall be paid for his services the usual and customary charges paid therefor in the metropolitan Chicago area from the gross collections made by him from "Villa Venice West". Said Receiver shall be responsible for the collection of all rentals and payment of all expenses. No extraordinary payments for capital improvements, or otherwise, shall be made by the Receiver without the consent of the parties hereto, and failing such consent, by order of Court. Said Receiver shall submit to the parties a monthly statement with respect to his operation and conduct of "Villa Venice West."

6. From and after the entry of this Decree, all parties hereto shall be and they are hereby enjoined and re-

strained, until further order of this Court, from paying or disbursing any proceeds derived from the operation of "Villa Venice West" to any person, firm, or corporation other than S. P. Construction, Inc., excepting the Receiver for the purposes hereinabove described in paragraph 5.

7. That from and afer the entry of this Decree and until further order of this Court, S. P. Construction, Inc. is enjoined and restrained from paying any salaries, dividends, fees, allowances, or emoluments of any kind or description to any of the parties hereto, their transferees or assigns.

8. That S. P. Construction, Inc. is, from and after the date of this Decree, enjoined and restrained from expending or employing any of its income, assets, or funds in connection with the litigation herein involved, or any other subsequent related cause, whether by way of attorneys' fees, court costs, or otherwise.

9. That an accounting be taken forthwith by Bansley & Kiener, 300 West Washington Street to ascertain the net sums, if any, due and payable to counterclaimant Robert Rauth based upon Rauth's 30% interest in the project known as "Villa Venice West" as determined by the opinion and judgment of the Appellate Court in the case of *Hurst* v. *Papierz,* id.

10. Said accounting shall encompass the period from January 1, 1963 to and including the date of conveyance of the property described in paragraph 3 hereof. The accounting shall determine the profits, if any, realized by Stanley Papierz Builders, Inc., as the record owner of "Villa Venice West," any and all salaries, dividends, or payments of any other kind made to Stanley or Theresa Papierz, their assignees or nominees, in connection with the operation of "Villa Venice West" arising out of their stock ownership, or otherwise, in Stanley Papierz Builders, Inc.

11. The accounting method employed to determine the amounts, if any, due Rauth shall be in accordance with generally accepted accounting principles and shall include such auditing procedures as, in the opinion of the accountant, are or may become necessary.

12. That in connection with the said accounting. Stanley A. Papierz, Theresa Papierz, and Stanley Papierz Builders, Inc. shall make available at all reasonable times and, if necessary, deliver upon request to the accountant all checkbooks, records, ledgers, journals, vouchers and any and all documents pertinent to said accounting made and kept during the period from January 1, 1963 to the date of conveyance described in paragraph 3 hereof, including copies of individual and corporate income tax returns of each of the aforesaid parties for each of the years involved. All of the parties hereto are enjoined and restrained from interfering in any manner with the taking of the aforesaid accounting by the accountant.

13. That the costs of said accounting shall be paid by Stanley A. Papierz, Theresa Papierz and Stanley Papierz Bulders, Inc. and each of the said parties shall be jointly and severally liable for said accounting charges.

14. That the Order heretofore entered herein denying the motion of Robert Rauth to dismiss the petition for an equtable lien filed in October of 1971 by Stanley Papierz, Theresa Papierz, S. P. Construction, Inc. and Stanley Papierz Builders, Inc. be and the same is hereby vacated, set aside and held for naught. That said petition for an equitable lien be and the same is hereby denied inasmuch as matters contained in said petition were not raised in either the Trial Court or the Appellate Court and the relief sought therein was not provided for in the Mandate of the Appellate Court. This order is without prejudice to the rights of said defendants as set forth in their Petition for Equitable Lien.

15. That Stanley Papierz, Theresa Papierz and Stanley Papierz Builders, Inc. are jointly and severally liable to

Robert Rauth for the following sums and shall pay same to him forthwith:

Bill of Costs taxed by Clerk of Appellate Court, First District in re *Hurst* v. *Papierz, et al.*, No. 53331	$ 624.30
	1,431.25
Total	$2,055.55

IT IS FURTHER ORDERED that there is no just reason to delay enforcement or appeal from any matter contained herein.

IT IS FURTHER ORDERED that execcution herein be and the same is hereby stayed 10 days from the date hereof.

/s/ Francis T. Delaney

APPENDIX B

OPINION OF THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Hurst v. *Papierz*

No. 58750

Opinion filed December 18, 1973

Mr. JUSTICE GEORGE J. MORAN delivered the opinion of the court:

Counterdefendants appeal from the following decree entered by the Circuit Court of Cook County:

"DECREE

This cause coming on to be heard on all of the pleadings herein and the Court having considered the Appellate Court Opinion, Judgment and Mandate rendered in this cause (*Hurst* v. *Papierz*, 129 Ill. App. 2d, 117, 262 N.E.2d 773), reversing the May 22, 1968, Decree of this Court, and the Court having considered the arguments of counsel and being fully advised in the premises, FINDS:

(A) That this Court has jurisdiction of the parties hereto and the subject matter hereof.

(B) That the Appellate Court found that the equities in this cause are with the counterclaimant, ROBERT RAUTH, and against the counterdefendants, STANLEY PAPIERZ, THERESA PAPIERZ and STANLEY PAPIERZ BUILDERS, INC. and that ROBERT RAUTH is entitled to the relief directed to be given to him by said Mandate.

(C) That the counterdefendants, STANLEY PAPIERZ, THERESA PAPIERZ and STANLEY PAPIERZ BUILDERS, INC., were found by the Appellate Court to have wrongfully and fraudulently

denied ROBERT RAUTH's 30% interest as a joint venturer in the Villa Venice apartment building complex; it was further found that since 1963 said defendants excluded ROBERT RAUTH from the operation and profits of said apartment building complex and that said counterdefendants possessed and operated said apartment buildings and refused to account to ROBERT RAUTH.

(D) That the Appellate Court found that the counterdefendants, STANLEY PAPIERZ and THERESA PAPIERZ, and the counterplaintiff ROBERT RAUTH, were joint venturers in the real estate development known as "Villa Venice West" and that ROBERT RAUTH owned a 30% interest therein.

(E) That the Illinois Appellate Court, First District, directed this Court to enter a Decree as follows:

(1) directing the conveyance by Stanley Papierz Builders, Inc. to S. P. Construction, Inc. of the property described in Paragraph 11 of the Rauth Counterclaim;

(2) granting Rauth the relief sought in Paragraphs (b), (c), (d) and (e) of the prayer for relief sought in his Counterclaim;

(3) entering such further orders as may be just and equitable; and

(4) vacating its order assessing the Master's fees and reassessing them in the light of this opinion.

(F) That no Petition for re-hearing of the Decision of the Appellate Court was filed nor was a Petition for leave to appeal to the Illinois Supreme Court and the Mandate of the Appellate Court remanding this cause to this Court issued in the Appellate Court on January 7, 1971.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the Decree entered herein on May 22, 1968, be and the same is hereby vacated, set side and held

for naught insofar as it dismissed the Amended Counterclaim of ROBERT RAUTH.

2. That ROBERT RAUTH is hereby decreed to be the owner of a 30% interest in the real estate development known as "Villa Venice West" as represented by his ownership of 30% of the outstanding common stock of S. P. Construction, Inc.

3. That defendants, STANLEY A. PAPIERZ, THERESA PAPIERZ, STANLEY PAPIERZ BUILDERS, INC., and any other person, firm or corporation asserting any interest in the following described property shall forthwith convey to S.P. Construction, Inc., a corporation, said premises located in the Village of La Grange, Illinois:

> Lots 1 to 48 in Block One and Block Eight in First Addition to West Chicago, being a Subdivision of that part of the West one-half of the South East one-quarter of Section 9, Township 38 North, Range 12, lying North of Vial Road (so called) in Cook County, Illinois.

Said conveyance shall be and is intended to include all of the real property, buildings, garages, outbuildings and all other structures appurtenant to and comprising a part of the apartment building complex known as "Villa Venice West" and located as aforesaid.

4. From and after the entry of this Decree, all income, receipts, revenues and proceeds thereafter derived from the operation of "Villa Venice West", in whatsoever form, and all assets, including cash on hand, shall become the property of S. P. Construction, Inc.

5. Michael P. Giambrone is hereby appointed Receiver to manage "Villa Venice West" until further order of this Court. Said Receiver shall be paid for his services the usual and customary charges paid therefor in the metropolitan Chicago area from the gross collections made by him from "Villa Venice West". Said Receiver shall be responsible for the collection of all rentals and payments of all expenses. No extraordinary payments for capital improvements, or

otherwise, shall be made by the Receiver without the consent of the parties hereto, and failing such consent, by order of Court. Said Receiver shall submit to the parties a monthly statement with respect to his operation and conduct of "Villa Venice West."

6. From and after the entry of this Decree, all parties hereto shall be and they are hereby enjoined and restrained, until further order of this Court, from paying or disbursing any proceeds derived from the operation of "Villa Venice West" to any person, firm, or corporation other than S. P. Construction, Inc., excepting the Receiver for the purposes hereinabove described in paragraph 5.

7. That from and after the entry of this Decree and until further order of this Court, S. P. Construction, Inc. is enjoined and restrained from paying any salaries, dividends, fees, allowances, or emoluments of any kind or description to any of the parties hereto, their transferees or assigns.

8. That S. P. Construction, Inc. is, from and after the date of this Decree, enjoined and restrained from expending or employing any of its income, assets, or funds in connection with the litigation herein involved, or any other subsequent related cause, whether by way of attorneys' fees, court costs, or otherwise.

* * *

14. That the Order heretofore entered herein denying the motion of Robert Rauth to dismiss the petition for an equitable lien filed in October of 1971 by Stanley Papierz, Theresa Papierz, S. P. Construction, Inc. and Stanley Papierz Builders, Inc. be and the same is hereby vacated, set aside and held for naught. That said petition for an equitable lien be and the same is hereby denied inasmuch as matters contained in said petition were not raised in either the Trial Court or the Appellate Court and the relief sought therein was not provided for in the Mandate of the Appellate Court. This Order is without prejudice to the rights of said defendants as set forth in their petition for equitable lien.

15. That Stanley Papierz, Theresa Papierz and Stanley Papierz Builders, Inc. are jointly and severally liable to Robert Rauth for the following sums and shall pay same to him forthwith:

Bill of Costs taxed by Clerk of Appellate Court, First District, in re *Hurst* v. *Papierz, et al.*, No. 53331	$ 624.30
	1,431.25
Total	$2,055.55

* * *."

•1 Counterdefendants first contend that the trial court had no authority to order an accounting because paragraph (g) of Rauth's complaint prayed for an accounting and this court in the prior appeal of this case did not grant that request. The argue that counterplaintiff's prayer for an accounting was barred by the doctrine of "res judicata". However, we are not concerned here with the doctrine of res judicata but with a doctrine known as "law of the case".

> "The doctrine that a determination of a question of law made by an appellate court in the course of an action becomes 'the law of the case' and many not be disputed by a reopening of the question at a later stage of the litigation is similar, analogous, and akin to the doctrine of res judicata, and has many things in common therewith. Both doctrines are founded on a public policy against reopening that which has previously been decided. However, the doctrine of the law of the case is not identical with the doctrine of res judicata, but differs in many important respects, and is distinguishable therefrom. * * *" 46 Am.Jur.2d, Judgments, par. 400, pp. 567-68.

One of the differences is pointed out in 5B C.J.S., Appeal and Error, Par. 1822, page 191, where it states that the rule of the law of the case is applicable only when the same point was decided on a previous appeal, while the doctrine

of res judicata applies to all questions which might have been litigated under the issues formed in the case as well as those actually decided. Therefore under the doctrine of the law of the case, the trial court was not precluded from ordering an accounting even though this issue was presented to but not decided by us in our prior opinion.

• 2 However, we believe that the plain language of our prior opinion did empower the trial court to order an accounting if he through that this should be done. In our previous decision, we held that Rauth had been defrauded by counterdefendants. Accordingly, we reversed and remanded this case to the trial court with directions to enter a decree ordering certain specific relief and for "such orders as many be just and equitable." This manifested a clear intent to grant certain specific relief to Rauth while leaving great discretion with the trial court to do complete justice and finally dispose of all aspects of the case. This would include the power to order an accounting and the use of any other legal tool to finally resolve this case.

Counterdefendants also contend that even though we determine that the trial court properly ordered an accounting, the method by which it is to be taken is contrary to Illinois law. After ordering an accounting, the trial court appointed an accounting firm to determine the net sums due and payable to Robert Rauth from the counterdefendants. We find no authority in law for a method of accounting which does not set forth a procedure by which evidentiary questions may be adjudicated. Whether the suit is referred to a master or is heard by the court itself, each party has a right to be heard in support of his rights. On the hearing they have a right to introduce evidence, cross-examine witnesses and take the various steps authorized by law to protect their rights.

Appellants suggest that the trial court should follow the rules of the Circuit Court of Cook County in taking the accounting, and refer the accounting to a master-in-chancery. Counterdefendants would then submit their accounts before the master and Rauth could then review the

accounting and have complete access to the books and records. Rauth could then file objections to the accounting and counterdefendants could then respond to his objections which would establish the issues. An evidentiary hearing could then be held to adjudicate the disputed items and objections to the master's report could then be filed before the circuit court. They state that this is the only procedure deemed proper by the Illinois Supreme Court in complicated accounting suits. *Williams* v. *Lindblom* (1896), 163 Ill. 346; *Patterson* v. *Johnson* (1895), 113 Ill. 559.

Prior to the passage of the new Illinois Constitution, there was a long line of cases in Illinois which held that in the case of a complicated accounting, the taking of such such should be referred to a master in chancery. However, Section 8 of Article VI of the Illinois Constitution now provides that "there shall be no masters in chancery or other fee officers in the judicial system". Constitution, Article IV, Section 8, *as amended*, effective Jan. 1, 1964.

•3 In view of the foregoing, the trial court itself must conduct the accounting, try all the issues, administer full relief to the parties and grant a judgment for the balance found due. In so doing, it is suggested that the trial court should follow established accounting procedures, except that it should not refer the case to a master or other fee officer as prohibited by the Illinois Constitution. In addition, it is suggested that the parties use the broad discovery tools available to them in the Supreme Court Rules.

•4 The counterdefendants next contend that the trial court's decree impermissibly ordered the conveyance of an entirely different parcel of land than the one specified in the mandate. Although it is generally true that a trial court must follow the specific directions of a higher court's mandate to the letter, the purpose of this rule is to insure the decree is congruent with the decision of the higher court. It is not a rule to be used by unsuccessful parties to thwart the conclusion of the case. In 1970, this court

decided the equities in favor of the counterclaimant. Pursuant to this conclusion, a package of specific equitable remedies was granted to achieve a certain result, to-wit: To recover that property (as described in paragraph 11) to S. P. Construction, Inc., which had been fraudulently conveyed to Stanley Papierz Builders, Inc., and to enjoin the trustee which held legal title to the rest of the property (as described in paragraph 4) involved in the joint venture from conveying it to any other than S. P. Construction, Inc. While this appeal was under consideration, the counterdefendants ordered the trustee to convey the property it held to S. Papierz Builders, Inc., and not S. P. Construction, Inc., and the trustee in fact has made that conveyance. In silence, the counterdefendants allowed this court to enjoin the trustee from conveying that property it in fact had already conveyed. This behavior by the counterdefendants was a badge of fraud. (37 Am. Jur.2d, *Fraudulent Conveyances,* §10, p. 701-02; 37 C.J.S. *Fraudulent Conveyances,* §§ 79 and 82.) The counterdefendants now wish to benefit from this behavior by asserting the chancellor was bound to do exactly as the mandate ordered. Equity will not allow the infliction of more fraud or the thwarting of justice by wrongdoers who hide under the guise of legal procedure. (30 S.J.S., *Equity,* § 89, p. 980.) Even if it could be shown that the conveyance by the trustee to another not S. P. Construction, Inc., was not fraudulent but merely an innocent mistake of law or fact entertained by both parties, equity would not permit it, for in substance it would unjustly enrich the counterdefendants by giving Rauth only one-third of his 30% interest in the venture. (30 C.J.S., *Equity,* § 89, p. 983.) In sum, under the circumstances, the chancellor's modification of this court's direction was entirely warranted and equitable.

Counterdefendants also contend that the chancellor erroneously described their behavior as wrongful and fradulent. This is frivolous argument. This court found the counterdefendants' behavior to be constructively fraudulent. The contention that constructive fraud is not wrongful or fraudulent is empty rhetoric.

Counterdefendants also disagree with the trial court's finding that Rauth is a 30% owner of the Villa Venice Apartments in La Grange, Illinois, but instead contend that Rauth only owns 30% of the outstanding stock in S. P. Construction, Inc. This issue was decided in 1970; Rauth is a co-venturer in the Villa Venice Apartments development. S. P. Construction, Inc., was a vehicle used by the joint venturers to help finance the venture and to hold title to the property acquired for the venture. In sum, the matter is res judicata and counterdefendants' argument is without merit.

Finally, we come to the interlocutory appeal which challenges the ancillary and provisional relief decreed by the trial court which essentially was intended to remove control and possession of the assets of the joint venture from the counterdefendants and place these assets *in custodia legis* until the accounting was complete and the case entirely resolved. The counterclaimant asked for a receiver after this court decided the equities in his favor in 1970. The counterdefendants had notice of this request for a receiver and were given an opportunity to present written and oral arguments opposing the appointment of a receiver before the now-disputed decree was issued in 1973, as evidence by the record of proceedings before the chancellor upon remandment.

•5, 6 Appointment of a receiver is considered generally to be a harsh remedy. Nevertheless, it resides in the arsenal of equitable remedies to be used when in the sound discretion of the chancellor it is needed to insure complete justice is done between the parties. (*People ex rel. Scott* v. *Pintozzi*, 50 Ill.2d 115, 227 N.E.2d 844; *Schack* v. *McKey*, 97 Ill.App. 460; *St. Louis, Vandalia & T. H. R.R. Co.* v. *Town of Vandalia*, 103 Ill. App. 363; *Taylorville Savings Loan and Bldg. Ass.* v. *Korenjack*, 275 Ill. App. 616.) In equity, the particular circumstances surrounding the case are the criteria by which to judge whether or not the appointment of a receiver was reasonable, *i.e.*, not arbitrary, capricious and an abuse of dis-

cretion. Considering that counterdefendants were found to be jointventurers with Rauth and defrauded him and have contumaciously and consistently resisted this conclusion in various ways, including behavior which appears to be continuing bad faith and at the very least a badge of fraud, we hold the appointment of a receiver and the imposition of the complained of temporary injunctions were proper in this case. *Hancock* v. *American Bonding & Trust Co.*, 86 Ill.App. 630.) It is reasonable to fear that there is a danger in this case that the property which belongs to the joint venturer may be placed beyond the jurisdiction of the court or in some way involved in transfers, conveyances or subjected to other claims, so as to render it more difficult for the court to give and enforce final relief to which counterclaimant may be found entitled at the conclusion of the accounting. *Schack* v. *McKey*, 97 Ill.App. 460; *Ditis* v. *Ahlvin Construction Co.*, 344 Ill. App. 551, 101 N.E.2d 633; 48 C.J.S., *Joint Adventurer*, § 12(i), p. 861.

For the foregoing reasons the judgment of the trial court is affirmed except for that portion which provided for the appointment of the accounting firm to take the accounting.

The judgment of the trial court is affirmed in part and reversed in part. This case is remanded for action consistent with this opinion.

Affirmed in part, reversed in part and remanded.

EBERSPACHER and CREBS, JJ., concur.

APPENDIX C

ORDER OF THE SUPREME COURT OF ILLINOIS DENYING PETITION FOR LEAVE TO APPEAL

UNITED STATES OF AMERICA

State of Illinois)
Supreme Court) ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eleventh day of March in the year of our Lord, one thousand nine hundred and seventy-four, within and for the State of Illinois.

Present: Robert C. Underwood, Chief Justice
Justice Walter V. Schaefer
Justice Daniel P. Ward
Justice Joseph H. Goldenhersh
Justice Thomas E. Kluczynski
Justice Charles H. Davis
Justice Howard C. Ryan

William J. Scott, Attorney General
William G. Lyons, Marshal
Attest: Justin Taft, Clerk

Be It Remembered, that, to-wit: on the 28th day of March 1974, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Ralph Hurst, No. 46505 vs. Stanley A. Papierz, et al., Robert K. Rauth, Respondent vs. Stanley A. Papierz, et al., Petitioners	Petition for Leave to Appeal from Appellate Court First District 58750 64 Ch 1448

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioners costs by him in this behalf expended, to be taxed, and that he have execution therefor.

I, JUSTIN TAFT, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

/s/ Justin Taft, Clerk,
Supreme Court of
the State of Illinois

APPENDIX D

OPINION OF THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Hurst v. *Papierz* General No. 53, 331

Opinion filed September 18, 1970

MORAN, P.J.

This action was initiated by Ralph Hurst to establish his ownership of a one-third interest with Stanley Papierz and Robert Rauth in an apartment project known as the Villa Venice Apartments located in LaGrange, Illinois. Defendant Robert Rauth filed a counterclaim against Stanley Papierz, Theresa Papierz, S. P. Construction, Inc., Stanley Papierz Builders, Inc., LaGrange State Bank, as trustee under Trust No. 180, and Baird & Warner, Inc., asserting a 30% interest as a joint venturer with Stanley Papierz in the same project. The cause was referred to a Master who took evidence and recommended that Hurst's complaint and Rauth's counterclaim be dismissed for failure to prove the material allegations therein. The Chancellor overruled all exceptions to the Master's report and entered a decree dismissing the complaint and counterclaim and assessing costs among all parties. Rauth only appeals from that portion of the decree dismissing his counterclaim. Hurst does not appeal.

In January, 1963, Hurst and Papierz were introduced and discussed the possibility of constructing apartment buildings on one of three land sites proposed by Hurst. The testimony is conflicting as to whether Papierz was to advance a down payment of 5% of the purchase price of the land, or whether he was to advance all capital necessary for deposits on the land, building permits and any other initial costs. Shortly thereafter, Rauth, Papierz's brother-in-law, was invited to participate. At one point the three met in Papierz's attorney's office to discuss

the legal aspects and each of their duties with respect to the project. Numerous meetings and phone calls followed, until it was learned that the three original land sites could not be purchased. Hurst and Rauth testified that Papierz agreed to continue the same arrangement with respect to any other suitable property that might be found. Papierz denied this assertion. Some time later Hurst located some ground in LaGrange, Illinois, owned by a man named Eiserman, on which the apartments were eventually built and which is the subject matter of this litigation. All three parties met with Eiserman and negotiated on several occasions before they purchased the property. Eventually, it was agreed in late May or early June to purchase the property for $210,000. Throughout this time, Rauth and Hurst had been spending two or three days each week on preliminary matters in furtherance of the project. The sale was conducted through an escrow with Chicago Title and Trust Company, with Papierz making a down payment of $17,500 with S. P. Construction, Inc. as grantee. Papierz, Rauth and Hurst all signed a written waiver of commission in connection with this sale on June 10, 1963. At the time of the escrow agreement Rauth owned 30% of the stock of S. P. Construction, Inc., and Stanley Papierz and Theresa Papierz, his wife, owned the remainder. This arrangement will be discussed more fully in the course of this opinion.

The Master's Report as it pertains to the dispute between Rauth and Papierz is in pertinent part as follows:

> "After Eiserman agreed to sell the LaGrange property for $210,000.00, Eiserman and Papierz further agreed that the sale of the property be through an escrow with Chicago Title and Trust Company as the escrowee and that a down payment of $17,500.00 be made by the parties at the time the escrow was opened; in addition, it was also agreed that Papierz, Hurst and Rauth were to execute written waivers of commission in connection with the LaGrange project. Papierz testified that he told Hurst that he

expected him (Hurst) to come up with the balance of the land loan to complete the project after Papierz deposited the required $17,500.00, and that if he did not, it could very well be that the said $17,500.00 would be defaulted. Papierz further testified that Hurst stated that he would have the balance of the land loan within three days, all of which Hurst denies. Hurst did not come up with the balance of the land loan within the prescribed time and, because of that, Papierz told Hurst his services were no longer needed for this venture and offered Hurst $1,500.00 for the alleged services he rendered which Hurst refused and caused the amended complaint to be filed.

"Between June 1 and June 14, 1963, prior to the date that the escrow was opened with Chicago Title and Trust Company, as escrowee, there was a conference between Papierz and Rauth as to Rauth's alleged interest in the LaGrange site. The testimony is conflicting again because Papierz testified that he offered to sell Rauth thirty per cent of S P Construction Company for $10,000.00 and that if the financing could be handled through S P Construction Company, then Rauth would have a thirty per cent of the LaGrange property; if not, then the arrangement would be off. Theresa Papierz, wife of Stanley Papierz, was present and testified to the same substance. Papierz further testified that Rauth was actually issued a certificate of thirty shares representing thirty per cent of S P Construction Company; that payments for the said certificate were made from time to time by Rauth and that a balance of $675.00 is still unpaid. Rauth's testimony is in direct conflict with Papierz's as Rauth contends there was no such condition placed on his thirty per cent of the LaGrange project as evidenced by his thirty shares of S P Construction Company stock, as the net worth of S P Construction Company was only $30,000.00.

"After the escrow was opened and after it was discovered that Hurst was unable to supply the neces-

sary land loan commitments to pay off Eiserman, Rauth and Papierz, individually and together, attempted to find land financing; that from June through October, 1963, approximately twenty financial institutions were visited by them in behalf of S P Construction Company. The evidence further disclosed that when Papierz was unable to pay the balance of the land purchase to Eiserman in the sum of $192,500.00 within the time period set forth in escrow due to Hurst's inability to get the necessary land loan financing, Eiserman agreed to various extensions providing Papierz pay the interest for each extension; that extensions for payment were agreed to be paid in October or November, 1963, upon Papierz paying $900.00 interest per month for each monthly extension period, and that Eiserman notified Papierz there would be no further extensions after that time and that he required payment in full or have a default entered.

"The various interest payment checks to Eiserman were paid by Stanley Papierz Builders, Inc., the corporation owned solely by Stanley Papierz and Theresa Papierz. All during this time the evidence further discloses that Rauth, besides attempting to secure financing on behalf of S P Construction Company, spent several days per week in Papierz's office dealing with subcontractors who were desirous of submitting bids on the LaGrange project.

". . ."

Findings of Fact

". . .

"3. That Stanley Papierz and Theresa Papierz, his wife, own all of the stock of Stanley Papierz Builders, Inc. that Stanley Papierz and Theresa Papierz, his wife, own all of the stock of S P Construction Company with the exception of thirty per cent which was sold to Robert Rauth in June, 1963, for $10,000.00; that the net worth of S P Construction Company is valued at approximately $30,000.00.

". . .

"18. That prior to the date of the opening of the escrow the Master finds from the greater weight of the evidence presented, taking into consideration testimony of all the witnesses, that Papierz did offer and did sell Robert Rauth thirty per cent of S P Construction Company for $10,000.00 so that Rauth might have a thirty per cent interest in the La Grange project, providing S P Construction Company would be able to underwrite the financing land loan for the project. No evidence was offered by Rauth that Papierz was to contribute any of his personal assets to finance S P Construction Co., in carrying the LaGrange site—the only evidence was that Rauth was to and did purchase thirty (30) shares of S P Construction Co. stock.

"19. The Master finds that Rauth was issued thirty shares of S & P Construction Company and that payments towards the $10,000.00 were made by Rauth and that a small balance is still unpaid."

[1-3] In his answer to Rauth's counterclaim, Papierz denies that he entered into an agreement with either Hurst or Rauth, but pleads further that he advised Hurst and Rauth that if they could obtain the necessary financing, he would put up the necessary cash not to exceed 5% of the purchase price and would give Hurst and Rauth an interest of 30% each in the project. Papierz did not attempt to prove this allegation, but instead at trial he testified that Rauth's interest in the project was predicated on the ability of S. P. Construction, Inc. to "swing or handle" the financing of Villa Venice on the strength of its own resources. This defense was never pleaded. Rauth argues that since Papierz did not prove his pleaded defense and since he did not plead the defense which he attempted to prove, that he is now left no defense at all, relying on the rule that a party cannot avail himself of any manner of defense not stated in the answer, even though it appears in the evidence, citing Jewett v. Sweet, 178 Ill 96, 52 NE 962; Potter v. Fon du

Lac Park Dist., 337 Ill 111, 168 NE 908, and other cases. However, Rauth did not initially object to Papierz's testimony concerning this condition and in fact, he rebutted that testimony with his testimony that no such condition existed, with the letter of Mrs. Papierz that they had agreed to submit financial statements, and with the testimony of Maria Grenet that financial statements were prepared in connection with obtaining financing for the project. Consequently, he has not been surprised or prejudiced by this variance and he will be deemed to have waived his objection since this variance could have been corrected by an amended pleading at trial. See Ill Rev Stats 1967, c 110, § 43(4), which states that "the facts constituting any affirmative defense . . . which if not expressly stated in the pleading *would be likely to take the opposite party by surprise,* must be plainly set forth in the answer or reply." (Emphasis added.)

Rauth further contends that the Master erred in holding that he had the burden of proving that his interest in the agreement was conditioned upon S. P. Construction, Inc. being able to underwrite the loan, thus erroneously requiring him to disprove an affirmative defense. The Master found, "Similarly, the burden of proof is upon Rauth to establish his alleged interest in the LaGrange project due to his ownership of 30% of S. P. Construction Company stock. The Master concludes that the testimony of Papierz and Rauth is conflicting, particularly whether Rauth's interest in the project was conditioned upon S. P. Construction Company being able to underwrite its own land loan. In the case at bar, the testimony of Papierz and Rauth are diametrically opposed as to this proviso, consequently, the testimony offered by Rauth is not clear and convincing as to lead to one conclusion."

[4, 5] The test of what constitutes an affirmative defense was discussed in Cunningham v. City of Sullivan, 15 Ill App2d 561, 147 NE2d 200. In that case, the court stated: "At common law and under the codes the test of whether a defense is affirmative . . . is whether the

defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. The admission of the apparent right is inferable from the affirmative defense." Applying that test to the case before us, we believe that the defense sought to be proved by Papierz, that the agreement whereby Rauth was to have a 30% interest in Villa Venice as evidenced by the thirty shares of S. P. Construction, Inc. stock conditioned on that company being able to underwrite its land financing alone, essentially admits the alleged contract to form a joint venture, but sets up new matter that the contract was conditional, seeking to negate its legal effect. Accordingly, we hold that the condition precedent sought to be proved by Papierz at trial is an affirmative defense which Papierz had the burden of proving and the Master erred in placing this burden of proof on Rauth. The condition asserted by Papierz does not constitute merely a denial because it does not negate any essential element of Rauth's prima facie case.

[6, 7] Rauth also contends that the Master erred in finding there was no joint venture between him and Papierz.

> ". . . In a court of equity, the substance of the transaction, and not the form, is to be regarded in the determination of the rights of the parties. A joint adventure may be established without any specific formal agreement to enter into a joint enterprise; it may be impled or proved by facts and circumstances showing such an enterprise was in fact entered into. It is the nature of the enterprise undertaken that controls, not the form of the agreement. If a joint enterprise be proved either by direct evidence of a mutual agreement, or by proof of facts and circumstances from which it is made to appear that such enterprise was entered into, the law fixes the rights of the parties." Ditis v. Ahlvin Const. Corp., 408 Ill 416 at 425, 97 NE2d 244.

It is undisputed that Papierz and Rauth made an agreement concerning the construction of the Villa Venice

Apartments and that Rauth was to have a 30% interest in the project. It is undisputed that Rauth paid $10,000 for thirty shares of S. P. Construction, Inc., and that this corporation under their agreement was supposed to take title to the property. It is undisputed that the deal to purchase the Eiserman property was made with S. P. Construction, Inc. as purchaser and Judge Eiserman and his wife as sellers on June 14, 1963, and that Rauth put in many days working on the venture from June until November, 1963. In fact, the Master found that both Papierz and Rauth made a concentrated effort to get land loan commitments for S. P. Construction, Inc. by contracting a large number of financial institutions.

In our opinion, the foregoing undisputed evidence established a joint venture as a matter of law, unless the agreement was conditioned upon S. P. Construction, Inc. being able to obtain the loan commitment from its own resources as claimed by Papierz.

[8, 9] Ordinarily, in an action between joint adventurers, the burden of proof as to a certain fact rests on the party who affirmatively alleges or claims that it exists, this being true in respect to such matters as the existence of a joint adventure, the the termination of the venture, the realization of profits which should be accounted for and distributed, etc. 48 CJS 853. However, the Master held that Rauth had the burden of proving by clear and convincing evidence that his interest in the proposed project was not conditioned upon S. P. Construction, Inc. being able to obtain financing for the whole project completely upon its own resources. In doing this, the Master put the burden of proof on this issue on the wrong party. Papierz affirmatively claimed the condition and he has the burden of proving it.

We now consider whether under all the evidence in this case Papierz has sustained his burden of proving that the project was conditioned upon S.P. Construction, Inc. being able to obtain all of the financing for the project with its own resources. This will require a rather detailed

analysis of the evidence offered by the principal witnesses who testified on this aspect of the case.

Rauth testified that he had a conversation in early June with Stanley and Theresa Papierz and Theresa suggested that instead of forming a new corporation they would put the project into S. P. Construction, Inc. because this was an existing company and it would save the cost of starting a new corporation. Stanley Papierz agreed with this proposal. Rauth received his certificate for thirty shares of S. P. Construction, Inc. stock on June 10, 1963, when Theresa handed him his stock certificate and told him that he was lucky to be able to get in on a project of this type for only a $10,000 investment.

A few weeks after the trust agreement was signed at the LaGrange State Bank, which was the 12th or 14th of December, 1963, Rauth had a conversation on "the 22nd of December or so" with Papierz. Papierz told Rauth at this time that the project was getting to big, that he had too much money involved out of his pocket and that he no longer wanted Rauth in the project. He told Rauth he was willing to buy back his stock in S. P. Construction, Inc. for $10,000, and he would give him a $6,000 salary or some other type fee for all the work Rauth had done in bringing Villa Venice to a reality.

Rauth refused, and Papierz told him that he would take what he is offered or he would get nothing. He told Papierz that they had an agreement. "I own thirty shares of stock in S. P. Construction Company. A deal is a deal. And Mr. Papierz said, 'I decided there will be no more deal and you get out of the picture.'" Rauth told Papierz, "I have thirty shares of stock," and Papierz told Rauth "that I could take my stock and . . ." He testified that Papierz further said that "the project will be put in Stanley Papierz Builders and not in S. P. Construction." Rauth told Papierz that the papers were signed, the applications were signed and they had a deal they were going to go through with. Papierz said, "You will take what I give you or you will get nothing," and that

was the extent of the conversation. Rauth continued to appear at the offices of Stanley Papierz Builders until the middle of January, and then he stopped coming in.

Maria Grenet testified on behalf of Rauth that she was employed by Stanley Papierz Builders, Inc. in March of 1963 as an accountant and worked there for three years, until May of 1966; that she was also familiar with the corporation known as S. P. Construction, Inc. She received her salary from Stanley Papierz Builders, Inc., did all the bookkeeping work, and in the year 1963 she prepared at least for financial statements for Stanley Papierz Builders, Inc. The first of these was around May or June, the second in July or August, and the third around October or November. She prepared one every three months. These were prepared at the request of Theresa Papierz. "They said they wanted to know how their business was going and at other times because they needed a financial statement for financial purposes."

Paul Reynolds, an expert in the field of mortgage financing, testified on behalf of Rauth that it was his opinion that a corporation with the limited resources of S. P. Construction, Inc. could never have obtained on its own either a mortgage or construction loan in an amount necessary to finance the project.

Stanley Papierz testified that about the time the escrow was opened with Judge Eiserman at the Chicago Title and Trust Company, he and his wife, Theresa, had a conversation with Rauth regarding the project on about the 8th, 10th or 12th of June in the kitchen of his home. He told Rauth what happened with Hurst, that "Ralph" had lied about the land loan, and Rauth told him that he knew that all the time. He knew that Ralph was no good and that he was right to begin with about him. Rauth then asked Papierz what he could do for him and "I told him that I would sell him 30% of S. P. Construction and that he and I would roll up our sleeves and I would go to escrow with Judge Eiserman. I told him that I would make a contract with Judge Eiserman

on S. P. Construction and he and I would roll up our sleeves. That is, we would roll up our sleeves and start looking for land loans. I told him that if we could find land on S. P. Construction and if we can swing this deal on S. P. Construction, then Bob will have himself 30% of Villa Venice Apartments. And I also told him, 'Bob, if we cannot swing this deal on S.P. Construction, you understand that not only you might lose money, but that I will, too.'" Rauth said that he was very grateful and he understood that very clearly and Papierz sold him 30% of S. P. Construction, Inc. for $10,000 and Rauth was issued a certificate for thirty shares of S. P. Construction, Inc. stock. That stock was issued on or about June 10, 1963 and represents 30% of the total shares of S. P. Construction, Inc. He and his wife own the remainder of the shares.

He and Rauth then contacted lending institutions together and Rauth went to see other lending institutions on his own during July, August, September, October and November. Rauth was also coming into the office three or four times a week for about four hours a day.

Papierz was then asked about his answer to Rauth's counterclaim and the following ensued: "The document entitled 'Answer to Counterclaim' filed on December 7, 1964, with the Clerk of the Circuit Court bears my signature. This document was prepared by my attorneys at the time, Castle, Brintlinger, Carey and Filter, and particularly by Mr. Thomas Carey. This document was prepared in accordance with the information I gave my lawyers. This document was under oath and I signed it." The sworn answer to the counterclaim was shown to Mr. Papierz and he was asked to read Paragraph 8 thereof.

> MASTER: "If he doesn't understand it all he has to do is say so. That's the reason I asked him to read the question again to him."
> ANSWER: "If am sorry, sir, I can't understand this language at all. No, I am not an attorney, I am a builder."

Q. "Isn't it a fact, Mr. Papierz, that what you are saying in Paragraph 8 is that the condition was imposed upon Rauth that he obtain the financing for S P?"

A. "No, I just don't understand his language here, Judge, in this paper here at all. I probably—if it probably would be put a little bit more clearly to me, maybe I would understand. This is the kind of a pleading that I have no idea what those things say there. See, my attorney wrote this thing, asked me to sign it. I signed it without reading it and that is usually the case."

In August of 1963, Papierz received a commitment from Baird & Warner for a construction loan in the amount of $615,000 for the construction of the middle section of the proposed project, which consisted of five buildings. He did not know where the money came from, but the contractors were getting paid from Baird & Warner. Judge Eiserman was paid for the land in November of 1963. The loans from LaGrange State Bank and Mergreen Company were presently paid in full. Baird & Warner paid off the LaGrange State Bank and Mergreen Company. Mergreen was paid off almost at the end of 1964 and the LaGrange State Bank probably in May or April of 1964.

Papierz submitted to some of the lending institutions his financial statement, those of S. P. Construction, Inc. and of Stanley Papierz, Builders, Inc.

In November, 1963, he learned from Mr. Cummins, a Vice President of the LaGrange State Bank that S. P. Construction, Inc. was not strong enough for that particular project, but they would give him a loan for one section if he would pledge Stanley Papierz Builders' assets and his personal assets. After his conversation with Cummins, he told Rauth he was no longer in the deal. It was the middle or end of November and it was after he had obtained the first commitment from Baird & Warner for a mortgage in the amount of $615,000 and

at that time he also had the promise of the LaGrange State Bank and Mergreen that he would have the money if he pledged all of Stanley Papierz's buildings.

He told Rauth that he had been to the LaGrange Bank that afternoon. His wife brought him a piece of paper that showed that they had almost $70,000 invested in the venture in LaGrange and the situation was very hopeless. He told Rauth exactly what Mr. Cummins had told him, "that if I pledge all of my holdings that will have the loan." He said to Rauth, "Bob, do you recall what we were discussing back in June, that if S P cannot swing it, either we are going to lose money or something is going to happen, because we will lose. You will lose your $10,000 and I will lose $70,000, Stanley Paprierz Builders must step in." He then said, "If I pledge all of my assets, there wouldn't have to be any loss of $70,000." He told Rauth that he was not going to pledge his assets and Stanley Papierz Builders' assets and even his life insurance policies for S. P. Construction, Inc. Rauth said, "I understand it and I understood it in June with you told me that." He told Rauth that if he wanted, he would buy the shares from Rauth and besides that, he would give him $6,000. Rauth said he did not want it, that he wanted 30% of S. P. Construction, Inc. because if another opportunity came up and S. P. Construction, Inc. could swing any future apartments, he wanted to be in on it and that is where they ended and ended as friends. Rauth kept coming around until the end of January when he filed suit. Rauth said to Papierz, "You keep my $10,000.00, Stanley. I don't want the $6,000.00 either." That was after Rauth put in the time from June until November.

Theresa Papierz testified concerning the original agreement between Stanley Papierz and Rauth and also as to what transpired when Papierz dismissed Rauth from the project. Her testimony was substantially the same as her husband's.

Joyce Kobylarz, Stanley Papierz's secretary, testified on behalf of Papierz that about the middle of November,

1963, she had a conversation with Rauth who was talking to a subcontractor and she said, "Mr. Papierz told me that you were not going to be talking to subcontractors any more. That I should handle this." Rauth said, "Well, Joyce, that's all right. I know that I'm out of the deal. S. P. can't swing it, but I want to help Stanley if I can. I would like to see this thing through for him as long as I am here. I would like to talk to him." He then continued during the month of December in her presence to interview subcontractors. He also came into the office during January and he would interview and talk to subcontractors then.

Walden Cummins, Jr., Senior Vice President of the La Grange State Bank, who in November of 1963 was its Vice President and Trust Officer, testified on behalf of Papierz that he first met Stanley Papierz in the bank about the first day of October, 1963, accompanied by a Mr. Robbins. He next met him about two weeks later when he came into the bank by himself. He first met Robert Rauth about the first week of November, 1963, when Mr. Papierz brought him in and introduced him as his brother-in-law. At that time there was a conversation between himself, Papierz and Rauth. By that time the financing arrangement had been worked out. He further testified, "I gave Mr. Rauth and Mr. Papierz a list of documents needed in order to secure the financing, which they, Mr. Papierz and Mr. Robbins, had requested." There was a general conversation about the location of these documents and a timetable to get them together. The documents that he said he needed were the deeds to fifteen or sixteen residential properties in Arlington Heights, an office building owned by Papierz or his company, and the documentation with reference to the land on which the apartment building project was subsequently built.

The next time he saw Rauth, Rauth came in alone with the documents that he had requested and left them with him. He brought in the deeds to the property, the

Chicago Title and Trust Guarantee policies and the contract between the seller of the LaGrange property and the buyer. He continued to see both of them until about December 1, 1963. After Rauth brought in the documents, Rauth, Papierz and Cummins had a conversation in late October of 1963. He testified, "I had been furnished with the documentation previously testified to by the time of this particular conversation. I had an opportunity to review it and told them that . . . ." (There was an objection.) He continued after another question, "I remember talking with both Mr. Papierz and Mr. Rauth, in substance stating that I had reviewed this documentation and that it appeared satisfactory to form the basis of collateral for the loan that Mr. Papierz had originally asked for." He then was asked if there was any conversation in relation to S. P. Construction, Inc., and he answered, "The conversation was an observation of myself. I said, 'S. P. Construction Company is not financially strong enough to support this loan request.'"

He testified on cross-examination that S. P. Construction, Inc. and Stanley Papierz Builders, Inc. combined, were not sufficiently strong financially to warrant such a loan, and that he would not have recommended making the loan if the interim loan commentment in the amount of $615,000 had not already been obtained from Baird & Warner, Inc. because, he testified, the bank contemplated being paid off through the funds provided by the construction loan, and not by any funds of Papierz.

The following evidence is inconsistent with Papierz's contention that it was understood at the outset that all financing for the project was to be done solely through the assets of S. P. Construction. Inc.:

(1) The initial down payment of $17,500 was made by Stanley Papierz Builders, Inc. and all of the other expenses for the project were paid by Stanley Papierz Builders, Inc. from the time of the signing of the contract until all of the financing was completed.

(2) The testimony of Paul Reynolds, an expert in mortgage financing, tended to prove that a corporation with the limited resources of S. P. Construction, Inc. could not have obtained on its own the necessary financing for the project. Prior to June 10, 1963, S. P. Construction, Inc. was a dormant corporation wholly owned by Stanley and Theresa Papierz. Its entire assets consisted of equity in three single-family dwellings in Arlington Heights, worth approximately $30,000. It had no office, no employees and maintained an average bank balance of a few hundred dollars.

(3) The undisputed evidence that the personal financial statements of Stanley Papierz and Theresa Papierz and the financial statements of Stanley Papierz Builders, Inc. were submitted to different financial institutions from June, 1963 until November, 1963, for the purpose of obtaining financing.

[10] (4) The affirmative defense claimed in Papierz's answer to Rauth's counterclaim was a different defense than he asserted at the trial. This was tantamount to an admission that his trial version was not true. However, it was not conclusive on this issue, but remained with all of the other evidence to be considered on the subject.

(5) On cross-examination Theresa Papierz was confronted with a letter she wrote to Rauth several months after suit was filed in which she said:

> ". . . Let me refresh your memory, we (Stanley and Theresa) were to invest $17,000.00 for the permits, plus our financial statement, plus necessary labor. . . ."

[11] In our opinion, Stanley Papierz has failed to sustain his burden of proof that Rauth's interest in the proposed apartment project was conditioned upon all of the financing being done through S. P. Construction, Inc.

Nor do we accept Stanley Papierz's and Theresa Papierz's testimony that Rauth willingly agreed to step

out of the project when Papierz informed him that the deal was off.

We do not find clear and convincing Stanley Papierz's testimony that the situation was "hopeless" and that he had to use everything to put the deal through, when at the same time he knew that the loan at the LaGrange State Bank was to be paid from the construction loan commitment already received from Baird & Warner and when he knew that the LaGrange State Bank was making the loan on the basis of that commitment rather than his pledged assets.

[12] Nor do we find clear and convincing the Papierz testimony that Rauth agreeably stepped out of the apartment project, declined the return of his own money in exchange for his stock and turned down a $6,000 profit in the hope that he might finance an apartment project through S. P. Construction, Inc. sometime in the future. This, after he had just been told that he was out of the present project because S. P. Construction, Inc. was not strong enough to finance a loan on its own resources and that Stanley Papierz Builders, Inc. would have to step in.

[13, 14] We conclude that Papierz and Rauth were joint adventurers and as such, Papierz occupied a fiduciary relation to Rauth as a matter of law. Consequently, the transaction whereby Papierz acquired Rauth's 30% interest in the apartment project was presumptively fraudulent and void. The burden was then on Papierz to show by clear and convincing evidence that he exercised good faith in appropriating Rauth's interest. In Carroll v. Caldwell, 12 Ill2d 487, 147 NE2d 69, the court said at 498:

> "Defendant concedes, as all authorities hold, that joint adventurers, as a matter of law, stand in a fiduciary relationship to each other and have the duty to act for the benefit of the other as to matters within the scope of the relation. (See: 30 Am Jur, Joint Adventures, Sec 34; 48 CJS Joint Ad-

ventures, Sec 5; Restatement of Trusts, Sec 2.) The relationship ordinarily precludes one of them from purchasing or leasing property to the enterprise either for himself or another in the absence of a full disclosure of his associates."

In Hagerman v. Schulte, 349 Ill 11, 181 NE 677, the court said at page 30:

"Since the sharers in the joint adventure sustained a fiduciary relation, each one to all the rest, their dealings with one another were subject to the rule that where one who sustains a fiduciary relationship to another acquires from that other an interest in the property in regard to which the fiduciary relation exists, the burden rests upon the one acquiring the interest to show by clear and convincing evidence that he exercised perfect good faith in the transaction by which his interest was acquired. Transactions between persons in this relation are presumptively fraudulent and void. Courts of equity scrutinize them very closely and before such a contract will be permitted to stand the proof must be clear that good faith has been exercised and confidence has not been betrayed."

[15] In June, Papierz agreed with Rauth to develop the Villa Venice project jointly as conventurers, with Rauth owning a 30% interest. Six months later, Papierz and his wife were the owners of all the property, which was the subject matter of the venture. Gone was Rauth's 30% interest, and lost was the time which he had spent on the project. In our opinion, the burden was on Papierz to show by clear and convincing evidence that he exercised good faith in the transaction. This he failed to do.

Then, too, Stanley Papierz and Theresa Papierz were the directors of and wholly controlled both S. P. Construction, Inc. and Stanley Papierz Builders, Inc. As President of S. P. Construction, Inc., Stanley Papierz directed the

LaGrange State Bank to convey title to the Villa Venice Apartment property to Stanley Papierz Builders, Inc., a corporation wholly owned by himself and his wife, although the contract to purchase the property was between Eiserman and S. P. Construction, Inc. Under these circumstances, the transaction was constructively fraudulent and the burden of showing its fairness and propriety was cast upon Stanley and Theresa Papierz. Winger v. Chicago City Bank & Trust Co., 394 Ill 94, 67 NE2d 265; Shlensky v. South Parkway Bldg. Corp., 19 Ill2d 268, 166 NE2d 793.

For the foregoing reasons, we find that the equities in this case are with the counterclaimant Robert Rauth and against the counterdefendants Stanley Papierz, Theresa Papierz and Stanley Papierz Builders, Inc.

This case is reversed and remanded to the Circuit Court of Cook County, Illinois, with directions to enter a decree (1) directing the conveyence by Stanley Papierz Builders, Inc. to S. P. Construction, Inc., of the property described in paragraph 11 of the Rauth conuterclaim; (2) granting Rauth the relief sought in paragraphs (b), counterclaim; (3) entering such further orders as any be just and equitable; and (4) vacating its order assessing the Master's fees and reasssessing them in the light of this opinion.

Judgment reversed and cause remanded with directions.

EBERSPACHER and GOLDENHERSH, J.J., concur.

APPENDIX E

REPORT OF THE PROCEEDINGS BEFORE THE HONORABLE FRANCIS DELANEY ON JUNE 25, 1973

Mr. Roth, to whose benefit the receivership is intended to enure, has not posted any security against our fees and costs to which we will be entitled if the Appellate Court dissolves that order.

The Court: You can so request, and Mr. Ahern can arrange and get that in here. The security for costs I presume is what you are talking about.

Mr. Friedman: Well, the statute talks about it in terms of the applicant's bond, I might say.

The statute also says that it is a prerequisite to the issuance of an order for a receiver.

Mr. Ahern: Mr. Roth was not the applicant.

Mr. Friedman: Who was the applicant?

Mr. Ahern: The decree was prepared by the court. There was no motion for any receiver that Roth has filed.

Mr. Friedman: That's a very interesting position to take. To whom do we look for damages when the Appellate Court reverses that order? Judge Delaney you are suggesting.

The Court: If you are looking to me, you are all in real trouble.

Mr. Friedman: I said that facetiously.

The Court: You said it honestly.